IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-692

PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

vs.

DONALD SOMERVILLE,

Respondent.

(On Writ Of Certiorari To The Court Of Appeals For The Seventh Circuit)

BRIEF FOR PETITIONER

WILLIAM J. SCOTT,
Attorney General,
State of Illinois,
JAMES B. ZAGEL,
E. JAMES GILDEA
Assistant Attorneys General,
188 West Randolph Street, Suite 2300,
Chicago, Illinois 60601,

Attorneys for Petitioner.

Printed by Authority of the State of Illinois

TABLE OF CONTENTS

Table of Authorities

Cases:

CONSTITUTION:

STATUTES:

MISCELLANEOUS:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-692

PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

vs.

DONALD SOMERVILLE,

Respondent.

(On Writ Of Certiorari To The Court Of Appeals For The Seventh Circuit)

BRIEF FOR PETITIONER

OPINIONS BELOW

The petitioner advanced his claim of double jeopardy in a direct appeal to the Appellate Court, First District, of the State of Illinois. The opinion is reported at 88 Ill. App. 2d 212 and 232 N.E. 2d 115 (1967). He then filed a petition to the Supreme Court of Illinois for a review of the appellate court decision, and that petition was denied. The denial of the petition for leave to appeal is reported at 37 Ill. 2d 627 (1967).

The opinion of the district court dismissing the petition for a writ of habeas corpus was not reported and is contained in the Appendix at 13.

The first opinion of the Court of Appeals for the Seventh Circuit affirming the district court is reported at 429 F. 2d 1335 (1970), and is contained in the Appendix at 18.

The second opinion of the Court of Appeals for the Seventh Circuit, the review of which is the subject of the writ of *certiorari*, is reported at 447 F. 2d 733 (1971), and is contained in the Appendix at 32.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Seventh Circuit were entered on July 20, 1971, with one judge dissenting. App. at 32. The State of Illinois' petition for a rehearing by the court *en banc* was denied September 3, 1971. App. at 39.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether a mistrial, which is declared after selection of a jury and before the taking of any evidence because the indictment is insufficient to charge an offense under state law, constitutes a bar to any retrial on the basis of the double jeopardy provision of the Fifth Amendment as made applicable to state prosecutions by the Fourteenth Amendment in a case where the void indictment deprives the state court of any power to exercise jurisdiction over the controversy.

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment to the Constitution of the United States:

> " . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . ."

Fourteenth Amendment to the Constitution of the United States:

> " . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."

STATEMENT OF THE CASE

Donald Somerville filed a petition for a writ of habeas corpus in the District Court for the Northern District of Illinois alleging as his sole grounds for relief that he had been twice placed in jeopardy contrary to the Fifth and Fourteenth Amendments of the Federal Constitution. App. 7-8. His petition alleged that he had once been placed on trial and a jury had been sworn whereafter the state prosecutor stated that the indictment was insufficient and asked the court to dismiss the jury, which it did. Thereafter a new indictment was returned, and he pleaded the bar of former jeopardy, which was overruled. He was tried, convicted and sentenced to the state penitentiary.

The State of Illinois, which was named as respondent, filed an answer to a rule to show cause entered by the district court and alleged that the petitioner was incarcerated pursuant to a judgment of conviction upon a verdict of guilty returned by a jury upon a trial for the offense of theft. The answer alleged that upon the first

trial, after the jury had been sworn, but before any evidence had been taken, the jury was discharged on motion of the prosecution over the token objection of the defendant because the indictment failed to allege criminal intent and therefore was void. The State's answer stated that a new and correct indictment was returned by the grand jury then sitting and that the petitioner was tried thereon and convicted. App. 12-13.

Both sides filed briefs in support of their positions, and there being no issue of fact, the court ruled on the pleadings and dismissed the petition on the basis that it was insufficient to support a claim for relief. The petitioner appealed to the Court of Appeals for the Seventh Circuit, and that court affirmed the order of dismissal with one judge dissenting. App. 18. The petitioner then filed a petition for a writ of *certiorari* to this Court. The petition was granted and the Court, without hearing argument, reversed and remanded with instructions to reconsider in light of *Downum* v. *United States* and *United States* v. *Jorn*. App. 31.

On remand the court of appeals requested additional briefs addressed solely to the application of *United States* v. *Jorn* to this case. The court of appeals then reversed the order of dismissal with one judge dissenting. Thereafter the State of Illinois filed a petition for a writ of *certiorari*, which this Court granted on March 20, 1972.

SUMMARY OF ARGUMENT

This Court has adhered to the "manifest necessity" doctrine in resolving the issue of double jeopardy when a former prosecution has been dismissed without the con-

sent of the defendant. Although a defendant in such a case loses the benefit of a particular jury, the loss is only speculative and he never loses the opportunity of selecting a fair and impartial jury to try his case. The right to a particular jury, standing alone, should not override the competing interest that society has in having the issue of the defendant's guilt decided on the merits.

The double jeopardy proscription is intended to foreclose government harassment and oppression against the accused. Erroneous indictments do not provide a convenient source for abuse of the prosecutor's powers: jurisdictional defects are objectively determinable, and the prosecution, at the time the indictment is drafted, is as likely to be injured by a void charge as is the defendant and, therefore, has every incentive to see that it is correctly framed. In contrast, the prosecution's inability to proceed with its evidence, as in *Downum* v. *United States*, is not judicially determinable. In *Downum* there was no "manifest necessity" to dismiss the case because other alternatives were available for alleviating the problem that arose. Further, the prosecution in *Downum* assumed the risk of being unable to prove its case when it proceeded to trial and in so doing abused its power of prosecution in assuming that it could avoid the consequences of an adverse verdict by obtaining a dismissal. None of these factors were present in this case.

Considering the number of possibilities for error that exist in the course of a criminal case, the Court should not formulate a rule of double jeopardy based solely on the source of error giving rise to the need for dismissing the proceedings unless it first determines that it is necessary to do so in order to effectuate the policies underlying the rule; nor should trial judges be encouraged to refrain

from discharging a jury when fatal error has occurred in order to avoid immunising the defendant from further prosecution. Unless the government has abused its power of prosecution, a trial judge should be allowed to discharge a jury whenever irreversible error has occurred without foreclosing further proceedings.

The order discharging the jury in this case was not an abuse of discretion because the court could not legally proceed with the trial. This was a state prosecution, and Illinois requires that felony prosecutions be initiated by grand jury indictment except when knowingly and intelligently waived by the defendant. An indictment which is insufficient to charge a crime does not entitle the court to try an accused. If the indictment cannot be amended, the court cannot continue, and is obliged to terminate the proceedings.

Traditionally, the rule against double jeopardy has excepted from its application former prosecutions which were terminated because of jurisdictional defects. While the prosecution cannot avoid an acquittal by subsequently questioning the jurisdiction of the court in a case where a defect was not known and the proceedings were not illegal, if a defect does become known to the parties and the court before a verdict is rendered, any proceedings thereafter would become illegal. The court below has departed from the traditional rule because of an erroneous conception of this Court's decisions.

For these reasons the opinion below should be reversed.

ARGUMENT

I.

A JURISDICTIONALLY DEFECTIVE INDICTMENT WHICH NECESSITATES THE DECLARATION OF A MISTRIAL SHOULD NOT BAR REPROSECUTION.

United States v. *Jorn*, 400 U.S. 470, 485-86 (1971), speaks about the "need to hold litigants on both sides to standards of responsible professional conduct in the clash of an adversary criminal process," thereby seemingly bringing into issue either side's responsibility for bringing about a mistrial. However, the Court also disavowed the creation of any "rules based on the source of the particular problem giving rise to a question of whether a mistrial should or should not be declared. . . ." *Id.* at 486. The point was considered insofar as it might affect a trial judge's discretion in declaring a mistrial rather than a criterion for determining whether there might be a reprosecution; the abuse of discretion rule was still the test for making that determination. Thus where either side engages in conduct which taints the proceedings, it might become necessary to declare a mistrial in order to prevent a miscarriage of justice.[1] Errors are not unexpected in the course of a criminal prosecution: statements are made which are improper,[2] sometimes by the

---

1. Of course deliberate misconduct designed to avoid an acquittal might well bar reprosecution. United States v. Jorn, 400 U.S. at 486 n.12; United States v. Tateo, 377 U.S. 463, 468 n.3 (1964).

2. Himmelfarb v. United States, 175 F. 2d 924 (9th Cir. 1949) *cert. den.*, 338 U.S. 860.

trial judge;[3] defects occur in procedural matters affecting arraignment,[4] or in the rendition of the verdict,[5] or examination of witnesses[6] or, as here, in the drafting of the indictment.[7] The fact that so many cases are reversed for new trials is evidence of the number of possibilities for error that exist. Reprosecutions are not precluded simply because the error was occasioned by the prosecution or the court since that would be an unnecessarily high price to exact from society to safeguard the interest of the defendant.[8]

It has been noted, however, that a mistrial deprives the defendant of the opportunity of having his case considered by the jury of his selection, whereas when there is a reversal the defendant has not lost that opportunity.[9] This

---

3. United States v. Giles, 19 F. Supp. 1099 (D.C. Okla. 1937); People v. Thomas, 15 Ill. 2d 344, 346-50; 155 N.E. 2d 16 (1958) *cert. den.*, 359 U.S. 1005.

4. Lovato v. New Mexico, 242 U.S. 199, 202 (1916).

5. Houp v. Nebraska, 427 F. 2d 254 (8th Cir. 1970); Crawford v. United States, 285 F. 2d 661 (D.C. Cir. 1960).

6. *Of.* Gori v. United States, 367 U.S. 364 (1961).

7. Haugen v. United States, 153 F. 2d 850 (9th Cir. 1946); Wolkoff v. United States, 84 F. 2d 17 (6th Cir. 1936); Simpson v. United States, 229 F. 940 (9th Cir. 1916), *cert. den.*, 241 U.S. 668.

8. "The determination to allow reprosecution in these circumstances reflects the judgment that the defendant's double jeopardy interests, however defined, do not go so far as to compel society to so mobilize its decision making resources that it will be prepared to assure the defendant a single proceeding free from harmful governmental or judicial error." United States v. Jorn, 400 U.S. at 484.

9. United States v. Jorn, 400 U.S. at 484.

distinction does not give sufficient consideration to the fact that reversal is premised on a finding that error occurred during the trial that was prejudicial and therefore might very well have lost the jury for the defendant. If so, the opportunity of going to the jury was worthless, and the distinction is insubstantial.[10] Furthermore, this presupposes that rather than just being entitled to a fair and impartial jury, a defendant deserves a jury of particular composition. While a defendant has a right to participate in the jury selection process, his degree of participation may vary widely depending on how much leeway the court allows the parties during *voir dire* of the jury. The Constitution tolerates such discretion in the trial judge because its primary concern is not with a particular composition but with the opportunities for selecting a fair and impartial jury. The privilege of selecting one particular jury should not loom so large as to override society's interest in having the case determined on the merits. It should be borne in mind that the loss of a particular jury, while perhaps not inconsiderable, does not foreclose the defendant from the opportunity of receiving a fair trial by another selected jury. The value to the defendant of a particular jury is not capable of objective determination, whereas the effect of the bar of double jeopardy is reckonable and final.

While it might be argued that if the government is responsible for a defective indictment it should bear the

---

10. *Cf.* United States v. Tateo, 377 U.S. 463, 466-67 (1964). "If the operative double jeopardy policy is to prevent the prosecution from depriving the accused of trial by the first jury impaneled, prosecution conduct leading to a reversible conviction is as offensive as that leading to a mistrial." Note, 77 Harv. L. Rev. 1272, 1280 (1964).

loss of further prosecution, such a penalty should not be imposed in the absence of a need to do so in order to effectuate the policies underlying the rule against double jeopardy. That policy which comes to mind is that which concerns governmental harassment or oppression; but defective indictments present little opportunity for that. There is every incentive for correctly framing an indictment since the prosecution stands to suffer as much as the defendant as a result of a void charge. Any tactical advantages derivable from a defective indictment are not perceptible at the time an indictment is drafted. Since a jurisdictionally defective indictment is readily subject to objective determination, the prosecutor cannot avail himself of a non-defective indictment as a pretext for gaining a mistrial when he encounters adversity during the presentation of his case.[11] On the other hand, jurisdictionally defective indictments which cannot be amended by the prosecution may provide a source for "abuse by the defendant of society's unwillingness to unnecessarily subject him to repeated prosecutions" by immunizing him from a sustainable conviction and inviting him to withhold objection until after an adverse judgment. *Cf. United States* v. *Tateo*, 377 U.S. 463, 468 and 468 n. 4 (1964).[12]

---

11. *But see* Duncan v. Tennessee, —— U.S. ——, 92 S. Ct. 785, 787, (Brennan, Douglas and Marshall, J.J. dissenting). (2/23/72).

12. In 1964 there were 3,846 separate indictments involving 5,034 defendants returned by Cook County, Illinois grand juries. Chicago Crime Commission, A Report On Chicago Crime For 1964, at 7 and 8. With this number of indictments it is not unexpected that errors in draftsmanship will occur; the report shows that 2 indictments were dismissed on motions to quash. *Id.* at 9.

In contrast to the instant case, *Downum* v. *United States*, 372 U.S. 735 (1963), must be recognized as one having different dimensions because of the prosecution's inability to sustain its burden of proof upon the trial of the merits. In the words adopted by the Court: "The situation presented [was] simply one where the district attorney entered upon the trial of the case without sufficient evidence to convict." 372 U.S. at 737. It is shortsighted to conclude that the holding rested simply on the basis that the prosecution created the predicament which occasioned the mistrial. *Jorn* rejected this as a criterion for deciding issues of double jeopardy. 400 U.S. at 485 and 486. Other factors more pertinent were involved. They reached the policy considerations underlying the rule itself, namely, "that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *United States* v. *Jorn*, 400 U.S. at 479. *See also Green* v. *United States*, 355 U.S. 184, 187-88 (1958).

After Downum had been placed on trial, the prosecution asserted that an essential witness was unavailable and that therefore it could not muster sufficient evidence with which to convict. It sought to put the case over to a more opportune time when it could garner sufficient evidence. As matters stood when the prosecution asked for the mistrial, the defendant, had the case proceeded to verdict, would assumedly have gained an acquittal. The fact that the prosecutor was remiss in failing to safeguard against this development is coincidental; the critical fact

was that the government could not convict the defendant with the evidence it had, and the defendant could not rightfully be deprived of the expectancy of an acquittal. Even if the prosecution had been blameless, as for example, if instead of being unavailable the witness had suddenly and unexpectedly become recalcitrant and refused to testify or testified falsely in favor of the defendant, that probably would not have justified the prosecution in asking for a mistrial for the purpose of seeking additional evidence with which to secure a conviction.[13] And not to be overlooked is the potential for abuse that this kind of mistrial presents since the necessity for the dismissal is not susceptible to judicial determination, but, rather, depends on the appraisal of the prosecutor: "If the prosecutor disliked the jury, or some of them, or hoped to find the defendant less prepared at a future day, or wished unnecessarily to harass him, he might at any time, attain his end, if, by solely alleging want of proof after a jury was sworn, he could get rid of them." *People* v. *Barret*, 2 Caines (N.Y.) 304, 308 (1805).

There are other factors which distinguish *Downum*, notably with regard to the "manifest necessity" doctrine. In *Downum* the government expressed its inability to proceed because of the absence of a witness named Rutledge. However, as the Court noted in its opinion, the indictment, as it concerned Downum, comprised six counts, only two of which involved Rutledge. Thus the case could have proceeded to trial on the remaining four counts. 372 U. S. at 737. Downum's counsel moved the court to dis-

13. Dortch v. United States, 203 F. 2d 709 (6th Cir. 1953), is a case that suggests otherwise, however, the rationale of the opinion is that a *nolle prosequi* is not tantamount to acquittal and, therefore, does not bar re-prosecution.

miss the Rutledge counts and to proceed on the others; however, the government objected and the court overruled Downum's motion. Justice Clark noted in his dissenting opinion that conviction on the remaining four counts would have been sufficient to support the maximum sentence. *Id.* at 743. In terms of the "manifest necessity" criteria, the interests of public justice would not have been frustrated had the case proceeded without Rutledge. In addition to that, the prosecutor assigned to the case knew beforehand that Rutledge had not been subpoenaed and that his whereabouts were unknown. In short, he proceeded to trial with full knowledge of the attendant risk, which was in itself an abuse of the prosecutor's authority. Furthermore, the trial judge failed to employ the available alternative of granting a short continuance to secure the attendance of Rutledge. The fact that he was available two days later demonstrates the unnecessity for discharging the jury under those circumstances.

In the instant case, the trial proceeded no further than the selection of the jury. The occasion for the mistrial is "plain and obvious": the court lacked jurisdiction; it could not try the issues without violating a valid State constitutional provision.[14] Thus the proceedings had to be terminated. In terms of the underlying policy considerations, there is less cause to find a breach under the circumstances of this case than there is in the case of a mistrial caused by a hung jury. In the latter case the evidence has been heard, the prosecution has learned the

---

14. *Cf.* Smith v. United States, 360 U.S. 1, 10 (1959); *Ex Parte* Bain, 121 U.S. 1, 13 (1887); Albricht v. United States, 273 U.S. 1, 8 (1926); United States v. Beard, 414 F. 2d 1014 (3rd Cir. 1966); Martiney v. United States, 216 F. 2d 760 (10th Cir. 1954), *cert. den.*, 348 U.S. 953 (1955).

defendant's case and has tested the strength of its own case. All things being equal, the prosecution is in a better position to secure a conviction upon a retrial. Secondly, the defendant has suffered the disquietude of an entire trial, and the anxiety of awaiting the verdict and the frustration of not receiving it. The personal hardships for the defendant are all the greater. Thirdly, considering that the *onus probandi* is upon the prosecution and not the defendant, technically speaking, it is chargeable with the failure to sustain its burden of proof in a single trial. Fourthly, that the jury could not agree, manifesting as it does one or more of the juror's doubts, is some evidence of the defendant's innocence. *Cf. Brock v. North Carolina*, 344 U.S. 424, 442 (Douglas, J., dissenting) (1953). It may even occur that only one of the jurors believes that the defendant is guilty. Or it may be that the prosecution failed in some respect in the presentation of its evidence, the correction of which on retrial will naturally enhance its ability to secure a conviction.[15] Still, this Court as repeatedly held that a mistrial because of a hung jury does not bar reprosecution.[16]

---

15. In one case it was reported that an indictment as drafted, while apparently sufficient for jurisdictional purposes, nevertheless may have been so confusing to the jury as to contribute to or perhaps even cause their inability to agree. Newsweek, April 17, 1972, at 33. If this were the case there is no distinction between the effect produced by the indictment in that case and the instant one.

16. United States v. Perez, 22 U.S. (9 Wheat.) 579 (1824); Logan v. United States, 144 U.S. 263 (1892); Dreyer v. Illinois, 187 U.S. 71 (1902); Keerl v. Montana, 213 U.S. 135 (1909).

A rule which automatically excludes as a basis for declaring a mistrial without barring reprosecution any event attributable to the prosecution is both unnecessary in principle and inexpedient in practice. The principal basis for the rule of double jeopardy is to foreclose abuse of prosecutorial discretion[17] and not to provide an escape hatch for the defendant. Where the event precipitating a mistrial is calculated to abort a trial in progress, the underlying policy is implicated and the rule should be applied. This would include the prosecution's declination to proceed with its evidence without sufficient reason. On the oter hand, events which do not conflict with the policy considerations underlying the rule should not, in the absence of some compelling reason, foreclose a trial on the merits. A rule which limits reprosecutions to mistrials caused by a "breakdown in judicial machinery" requires that a trial continue to its probably reversible conclusion whenever some other impediment occurs. This will necessitate a retrial whenever the case results in a conviction.

---

17. Sigler, Double Jeopardy, 157-87 (1969). As to this point and its application here, reference should be made to Gori v. United States, 367 U.S. 364, and United States v. Jorn, 400 U.S. 470. In Gori, the trial judge declared a mistrial when he anticipated misconduct by the prosecutor. Concededly the judge was premature and erred in acting so quickly in declaring a mistrial; yet his error in aborting the trial did not operate as a bar to reprosecution. In Jorn, the trial judge also declared a mistrial prematurely; however, in that instance he abused his discretion and, therefore, reprosecution was barred. There is no rationale for different standards with respect to the conduct of the prosecutor since the effect on the defendant in either case will be the same.

"More satisfactory than the limitation of manifest necessity to 'breakdown[s] in judicial machinery' may be an interpretation couched in terms of whether a verdict sustainable on appeal could not have been obtained had the trial judge not terminated the proceeding when he did. If the answer is yes, reprosecution ought to be barred unless the accused himself solicited a mistrial. If the answer is no, reprosecution ought to be permitted unless the prosecution intentionally precipitated a mistrial. Since a mistrial for prosecutor misconduct not so designed would bar reprosecution only if the trial judge erred in concluding that a sustainable verdict was no longer possible, he has every incentive to terminate the proceeding when it has become incurably tainted."[18]

"[A] criminal trial is, even in the best of circumstances, a complicated affair to manage." *United States* v. *Jorn*, 400 U. S. at 479. It requires the coordination of a great many people to prepare a case for trial. Not all of them are trained lawyers. Even the most ministerial functions may, however, affect the end result. When there are so many things to be accounted for, some will necessarily require more attention than others, as for example the assembling and interviewing witnesses, marking and identifying physical evidence, scheduling trial dates, answering pretrial motions, legal research, supervising followup investigation, *etc.* Complexity in turn creates more occasions for mistakes. The Court should not fashion a rule that cannot tolerate a retrial solely because the responsibility for a mistrial is chargeable to the prosecution if there is no basis for concluding that there was a misuse of the prosecutor's powers.

---

18. 77 Harv. L. Rev. at 1281.

II.

UNDER THE DOCTRINE OF "MANIFEST NECESSITY" THERE IS NO ABUSE OF DISCRETION WHEN A COURT DISCHARGES A JURY BECAUSE OF A JURISDICTIONAL DEFECT IN THE PROCEEDINGS.

Precedent does not oppose retrial after dismissal of a previous prosecution before verdict because of a defective indictment (*infra* at 24). Admittedly there has been a tendency to avoid immutable and narrow rules when dealing with double jeopardy issues arising in that class of cases where "the initial proceedings are aborted prior to verdict without the defendant's consent." *United States* v. *Jorn*, 400 U.S. 470, 480. Instead, this Court has adopted the policy that trial judges may "discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated." 400 U.S. at 481.[19] This policy invites latitudinal application. Attempts to elicit more explicit statements from the Court have for the most part been rejected. *E.g.*, *Wade* v. *Hunter*, 336 U.S. 684, 691 (1949); *United States* v. *Jorn*, 400 U.S. at 480. However, in *Jorn* the Court did focus attention on the adjunctive precept that trial judges are required to exercise "sound discretion" in deciding whether there exists a manifest necessity for declaring a mistrial. The issue surfaced in that case after the trial judge abruptly declared a mistrial for the ostensible purpose of protecting the Fifth Amendment rights of prosecution witnesses even after being told by

---

19. *See* Annotation, 6 L. Ed. 2d at 1510.

both the witnesses and the prosecutor that sufficient safeguards had been provided. In addition to the lack of necessity for the declaration of the mistrial, the precipitateness thereof precluded any alternative measures such as a short continuance to allow the witnesses to confer with counsel. The Court found that it was an abuse of discretion to declare a mistrial under these circumstances.

Judged by that case, there was no abuse of discretion here. The indictment failed to allege intent, an element of the offense which the statute proscribed[20] and which

---

20. Ill. Rev. Stat. 1963, Ch. 38, § 16-1(d)(1):

"16-1. § 16-1. Theft.) A person commits theft when he knowingly:

(a) Obtains or exerts unauthorized control over property of the owner; or

(b) Obtains by deception control over property of the owner; or

(c) Obtains by threat control over property of the owner; or

(d) Obtains control over stolen property knowing the property to have been stolen by another or under such circumstances as would reasonably induce him to believe that the property was stolen, and

(1) *Intends to deprive the owner permanently of the use or benefit of the property; or*

(2) Knowingly uses, conceals or abandons the property in such manner as to deprive the owner permanently of such use or benefit; or

(3) Uses, conceals, or abandons the property knowing such use, concealment or abandonment will deprive the owner permanently of such use or benefit."

was necessary to convict the defendant.[21] Where intent is an element of the offense it must be alleged and proved.[22] Failure to allege a necessary element of intent amounts to a failure to allege a crime.[23] At the time, Illinois by constitution provided that "[n]o person shall be held to answer for a criminal offense unless on indictment of a grand jury, except in cases in which the punishment is by fine or imprisonment other than the penitentiary, in cases of impeachment, and in cases arising in the army and navy, or in the militia, when in actual service in time of war or public danger . . . ."[24] In construing this provision the Supreme Court of Illinois has held that an indictment is a jurisdictional requirement for a criminal prosecution in this State: *People* v. *Edge*, 406 Ill. 490, 493, 94 N.E. 2d 359, 361 (1950); *People* v. *Harris*, 394 Ill. 325, 68 N.E. 2d 728, 729-30 (1946); *People* v. *Fore*, 384 Ill. 455, 51 N.E. 2d 548 (1943). Intermediate courts have adhered to the rule: *People* v. *Greene*, 92 Ill. App. 2d 201, 235 N.E. 2d 295 (1968); *People* v. *Somerville*, 88 Ill. App. 2d 212, 232 N.E. 2d 115 (1967), *leave to appeal denied*, 37 Ill. 2d 627 (1968), *cert. den.*, 393 U.S. 823;

---

21. People v. Matthews, 122 Ill. App. 2d 264, 258 N.E. 2d 378, 382 (1970); People v. Hayn, 116 Ill. App. 2d 241, 245, 253 N.E. 2d 575 (1969); People v. Somerville, 88 Ill. App. 2d 212, 232 N.E. 2d 115 (1967), *leave to appeal denied*, 37 Ill. 2d 627 (1968), *cert. den.*, 393 U.S. 823 (1968).

22. People v. Edge, 406 Ill. 490, 493, 94 N.E. 2d 359 (1950); People v. Harris, 394 Ill. 325, 68 N.E. 2d 728 (1946); *See* 16 A.L.R. 3d 1093.

23. *See* 17 A.L.R. 3d 1181, 1217-22.

24. Constitution of Illinois 1870, Art. II, § 8. The Illinois Constitution was amended in 1970, but this provision has been retained in Article I, § 7.

People v. *Billingsley*, 67 Ill. App. 2d 292, 213 N. E. 2d 765 (1966). Further, it is required that the indictment be sufficient to charge the commission of an offense. *People ex rel. Ledford* v. *Brantley*, 46 Ill. 2d 419, 422, 263 N. E. 2d 27 (1970). Viewed in the context of applicable Illinois law, the judge could not have proceeded with the trial.[25] Whatever the circumstances with regard to the State's right to reprosecute, when the trial judge was called upon to decide the question of his own judicial authority to try the case, he had no choice but to declare his want of jurisdiction and to terminate the proceedings. Even if the judge had believed that the State could not reprosecute if he terminated the case under these circumstances, that fact would not have changed anything insofar as his obligation to declare his lack of jurisdiction. The jurisdictional requirement was not suspended by reason of any unwanted consequence; the court's duty remained unaffected.[26]

Aside from the judicial impropriety of proceeding to trial in the face of the fatal infirmity, the practical consideration that no conviction obtained could have withstood subsequent attack meant that the case would have had to be retried if the defendant had been convicted. In effect, then, the defendant was no longer in jeopardy—if he ever was—since he was aware of the jurisdictional defect, and any judgment of conviction could not prevail against him. While a prosecutor cannot avoid a verdict

---

25. *Cf.* 17 A.L.R. 3rd 1181, 1217.

26. "[W]hile the trial judge should not be free to terminate a proceeding for minor prosecution misconduct neither should he be deterred from terminating an irrevocably flawed proceeding out of fear of immunizing the accused from further prosecution." 77 Harv. L. Rev. at 1281.

of acquittal simply by raising a jurisdictional issue, where a jurisdictional defect is recognized before the proceedings have run their full course, the case cannot proceed to verdict without the taint of illegality. In the case of discovery of the defect after acquittal, the rendition of the verdict is not illegal since the error was not known at the time; furthermore, it cannot be said that the determination of the jury was influenced by the jurisdictional defect. In the case where the error is discovered before the verdict, the entire proceedings, including the rendition of the verdict, would become illegal once the case proceeded after the parties discovered that the court was without power in law to try the case.[27] No one could reasonably argue that a trial should proceed in that instance. "Concepts of impartial justice and scrupulous fairness to a defendant do not include an opportunity to speculate upon the chance of a favorable verdict when . . . a legal defect has substantially eliminated the chance of an unfavorable one." *People* v. *Thomas*, 15 Ill. 2d 344, 349-50; 155 N.E. 2d 16 (1958), *cert. den.*, 359 U.S. 1005. *Jorn* does not conflict with what the trial judge did in this case, hinging as it did on the abuse-of-discretion

27. It has been suggested that when confronted with error during the course of the trial, "rather than impose a mistrial and thereby immunize the defendant against further prosecution, the judge may prefer to let the trial run to its probably reversible conclusion." *Id.* at 1279. Under the circumstances of this case, even if the trial had continued and a conviction were obtained and later reversed for want of jurisdiction, there might still be merit to a plea of double jeopardy at any subsequent prosecution since the court would have acted illegally in proceeding to verdict in the first place.

principle, since here there was no discretion available to the judge.[28]

Also in contradistinction to the *Jorn* situation is the fact that alternatives were not available here for alleviating the problem. The indictment could not have been corrected. Some states have enacted statutes which permit the amendments of indictments.[29] The extent to which amendments are permitted vary among the several states depending upon their particular statutes. Illinois has an amendment statute;[30] however, it is limited to the cor-

---

28. The American Law Institute Model Penal Code, Proposed Official Draft, Art. 1, Sec. 1.08(4)(b)(2), allows for reprosecution when a trial has been terminated because "[t]here is a legal defect in the proceedings which would make any judgment entered upon a verdict reversible as a matter of law. . . ." The Commentary on Subsection (2) defines "legal necessity" for a mistrial as a "void indictment or information or some other serious procedural defect."

29. 17 A.L.R. 3d 1181, 1208 *et seq.*

30. Ill. Rev. Stat. 1963, ch. 38, § 111-5 provided:

"An indictment, information or complaint which charges the commission of an offense in accordance with Section 111-3 of this Code shall not be dismissed and may be amended on motion by the State's Attorney or defendant at any time because of formal defects, including:

(a) Any miswriting, misspelling or grammatical error;

(b) Any misjoinder of the parties defendant;

(c) Any misjoinder of the offense charged;

(d) The presence of any unnecessary allegation;

(e) The failure to negative any exception, any ex-

rection of formal defects. *People* v. *Petropoulos,* 59 Ill. App. 2d 298, 208 N.E. 2d 323, 336 and 336 n. 13, (1965) *aff'd.* 34 Ill. 2d 179, 214 N.E. 2d 765 (1966); *People* v. *Hall,* 55 Ill. App. 2d 255, 204 N.E. 2d 473, 474-75 (1964). The defect here was more than a formal one since the omitted portion comprised an essential element of the crime. In absence of an applicable amendment statute, no change could have been made in the indictment. *Patrick* v. *People,* 132 Ill. 529, 533; 24 N.E. 619 (1890).[31] Nor could the defect have been waived since it was jurisdictional. *People ex rel. Ledford* v. *Brantley,* 46 Ill. 2d at 422; *People* v. *Petropoulos,* 59 Ill. App. 2d 298; Ill. Rev. Stat. 1963, Ch. 38, Sec. 114-1 (b).[32]

---

cuse or proviso contained in the statute defining the offense; or

(f) The use of alternative or disjunctive allegations as to the acts, means, intents or results charged."

31. *See* 17 A.L.R. 3d 1181, 1196-99, 1203-05.

32. *Id.* at 1199-1201, 1206. The Illinois Constitution contained a proviso that the indictment requirement could be dispensed with by enactment of the legislature. Pursuant thereto a statute (Ill. Rev. Stat. 1963, ch. 38, § 111-2) permitted waiver of indictment and prosecution by information. Waiver could not be presumed since the court by Supreme Court Rule must first admonish the defendant. Ill. Rev. Stat. 1963, Ch. 110, § 101.26.

I.I.I..

HISTORICALLY, THE RULE OF DOUBLE JEOPARDY HAS NOT BARRED REPROSECUTIONS IN THOSE CASES WHERE A FORMER PROSECUTION HAS BEEN DISMISSED FOR WANT OF JURISDICTION.

It has been the general rule that the bar of double jeopardy does not lie when a case is dismissed before verdict for want of jurisdiction.[33] Historically, this has been the case whether the want of jurisdiction was due to the court's inherent incompetency[34] or some defect in the criminal procedure by which the accused was prosecuted.[35] Typical of the reasons given is that stated by the Supreme Court of California in *People* v. *McNealy*, 17 Cal. 332 (1861):

> "It would be a contradiction in terms to say that a person was put in jeopardy by an indictment under which he could not be convicted, and it is obviously immaterial whether the inability to convict arises from a variance between the proof and the indictment, or from some defect in the indictment itself."

---

33. Bartkus v. Illinois, 359 U.S. 121, 161 (1959) (Black, J., dissenting); Grafton v. United States, 206 U.S. 333, 345 (1907); United States v. Ball, 163 U.S. 662, 669 (1896); *Ex Parte* Lange, 85 U.S. (18 Wall.) 163, 174, (1873); United States v. Gibert, 25 Fed. Cas. 1287, 1295 (C.C.D. Mass. 1834); 1 Wharton, Criminal Law And Procedure 310 (Anderson Ed. 1957), Orfield, Double Jeopardy in Federal Criminal Cases, 3 Calif. West. L. Rev. 76, 83 (1967); Note, 77 Harv. L. Rev. 1272, 1281-82 (1964); Note, 24 Minn. L. Rev. 522, 526-27 (1940).

34. *Cf.* Diaz v. United States, 223 U.S. 442, (1912); *See* 4 A.L.R. 2d 874.

35. Simpson v. United States, 229 F. 940, 944 (9th Cir. 1916); 4 Blackstone, Commentaries *336.

The origin of the rule is buried in antiquity; however, for purposes of the present discussion, criticism surrounding the rule seems to have first arisen in *Vaux's Case*, 4 Co. 44a, 76 Eng. Rep. 992 (K.B. 1590). In that case, the defendant was discharged after being tried for murder when the jury returned a special verdict upon which a judgment was rendered in his favor. When he was indicted a second time for the same offense, Vaux pleaded the bar of *autrefois acquit*, and it was held that the plea was not good.

Vaux's Case provoked discussion as to whether the holding was correct in light of the bar of *autrefois acquit*, which has been subsumed in the concept of double jeopardy. In *Vaux* the special verdict recited that the deceased, Nicolas Ridley, was killed by taking poison and that Vaux (who was charged with persuading him to take it), was not present at the time. Upon the special verdict the trial court adjudged that Vaux was not guilty of murder. The Court of King's Bench, when it subsequently ruled on the issue of the plea of *autrefois acquit*, stated that Vaux could have been adjudged guilty as a principal even though he was not present when Ridley drank the poison. It held, however, that the first indictment was defective for failing to allege that Ridley received and drank the poison and that therefore Vaux had not been in jeopardy and could be retried.

The case has been criticized on the basis that Vaux had been adjudged not guilty even though the jury's verdict was special, and that the defendant's discharge was not attributable to the insufficiency of the indictment, even though Vaux had attacked the indictment as being insufficient. In explicating the decision, Lord Coke noted that the original judgment could have been given

for either lack of guilt or insufficiency of the indictment. 3 Inst. 214. Lord Hale, however, believed that the judgment was sustainable only on the basis of the verdict and therefore barred further prosecution, 2 Hale P. C. 394, 395: herein lies the basis of the criticism.

In *United States* v. *Ball*, 163 U.S. 662 (1896), the Court, after discussing the issue, rejected the idea that a defective indictment voids an acquittal on the merits. However, the original rule that a mistrial resulting from a jurisdictional defect does not bar reprosecution had not been rejected prior to the holding of the court of appeals below. The first opinion of the court of appeals distinguished this case from *Ball* and its progeny, *Benton* v. *Maryland*, 395 U.S. 784 (1969), on the basis that in the latter cases it was the *acquittal* which was relied upon by the Court in support of its holdings. App. at 22. In this regard it is indicative that the reasoning of the Court in *Ball* was taken from Justice Livingston's dissent in *People* v. *Barrett*, 1 Johns. (N.Y.) 66, 74 (1806). The Court made mention of the fact that Justice Livingston had distinguished those "cases in which upon the first trial there had been no general verdict of acquittal by the jury, but only a special verdict, upon which the court had discharged the defendant . . ." 163 U.S. at 667. In fact, Justice Livingston distinguished the *Barrett* case from *Vaux* on the basis that "[t]he jury had *not acquitted*, nor given *any opinion* on [Vaux's] guilt, but had referred the whole matter to the court." 1 Johns at *73. [emphasis in the original]. However, it was not simply an acquittal which influenced the Court in *Ball* but an acquittal on the merits. In the course of its reasoning the Court cited a Massachusetts' statute which provided in part:

> "If any person, who is indicted for an offense, shall on his trial be acquitted upon the ground of a variance between the indictment and the proof, or upon any exception to the form or to the substance of the indictment, he may be arraigned again on a new indictment, and may be tried and convicted for the same offense notwithstanding such former acquittal." 163 U.S. at 669.

The Court's holding in *Ball* was worded so as to limit its application to cases where there has been an acquittal on the merits:

> "[W]e are unable to resist the conclusion that a general verdict of acquittal upon the issue of not guilty to an indictment undertaking to charge murder, and not objected to before the verdict as insufficient in that respect, is a bar to a second indictment for the same killing." *Id.* at 669.

Where there has not been an acquittal on the merits, it is not considered that the bar of double jeopardy precludes reprosecution when the case is dismissed because of a jurisdictional defect.[36] This is what the court of appeals originally decided. App. at 22. However, in the opinion below the court rejected this analysis—citing *Green* v. *United States*, 355 U.S. 184, 188 (1957) and *United States* v. *Jorn*, 400 U.S. 470 (1971)—upon the principle that jeopardy "attaches" and the issue is determined when the jury is sworn. App. at 33-34.[37]

---

36. Simpson v. United States, 229 F. 940, 944 (9th Cir. 1916), *cert. den.*, 241 U.S. 668; Orfield, *supra*, note 33 at 81; 77 Harv. L. Rev. 1272, 1282.

37. The general rule is considered to be that which was stated in Hunter v. Wade, 169 F. 2d 973, 975 (10th Cir. 1948) *aff'd.*, 336 U.S. 684 (1949): "It is the general rule that an accused is in jeopardy within the meaning of the guaranty against double jeopardy contained in the

The concept of "attachment" has not proven satisfactory in resolving questions of former jeopardy.[38] In defining "attachment" just as in defining "jeopardy," abstract concepts do not always serve to effectuate the policies sought to be promoted by the rule prohibiting double jeopardy.[39] In this vein some commentators have found fault with the statement that a defendant has not been in "jeopardy" when he has been tried on a defective indictment.[40] But in spite of semantic objections, the fact remains that the origins of the plea of double jeopardy did not include the idea that it should bar reprosecution when a procedural defect prevents a judgment of conviction from being sustained. Thus, Blackstone qualifies the term in reference to such situations by saying that the "[defendant] has not been *in jeopardy* in the sense which entitles him to plead the former acquittal or conviction in bar of a subsequent indictment." 4 Blackstone Commen-

---

Fifth Amendment to the Constitution of the United States when he is put on trial in a court of competent jurisdiction upon an indictment or information sufficient in form and substance to sustain a conviction and a jury has been empaneled and sworn; and where the case is tried to the court without the intervention of a jury, jeopardy attaches when the court begins the hearing of evidence."

38. *See, for example,* Himmelfarb v. United States, 175 F. 2d 924, 932 n.2 (9th Cir. 1949), *cert. den.*, 338 U.S. 860 (1949); Sigler, Double Jeopardy at 74 (1969); *Cf.* Stanford v. Robbins, 115 F. 2d 435, 438-39 (5th Cir. 1940), *cert. den.*, 312 U.S. 697.

39. *Cf.* United States v. Tateo, 377 U.S. 463, 466 (1964).

40. People v. Barrett, 1 Johns. (N.Y.) 66, 73 (1806).

taries *336.[41] Similarly, jurists have had to adapt the concepts of attachment and jeopardy to comport with the needs of particular factual situations. For example:

"[J]eopardy is not regarded as having come to an end in those cases where 'unforseeable circumstances . . . arise during [the first] trial making its completion impossible, such as the failure of a jury to agree on a verdict.' " *Green* v. *United States*, 355 U. S. 183, 188 (1957).

• • • •

"The double jeopardy provision of the Fifth Amendment, however, does not mean that everytime a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment. Such a rule would create an insuperable obstacle to the administration of justice in many cases in which there is no semblance of the type of oppressive practices at which the double-jeopardy prohibition is aimed." *Wade* v. *Hunter*, 336 U. S. 684, 688 (1949).

• • • •

"[T]he conclusion that 'jeopardy attaches' when the trial commences expresses a judgment that the constitutional policies underpinning the Fifth Amendment's guarantee are implicated at that point in the proceedings. The question remains, however, in what circumstances retrial is to be precluded when the initial proceedings are aborted prior to verdict without

---

41. *Cf.* Regina v. Drury, 3 Car. & Kir. Rep. 193, 199 (1849): "The true meaning therefore of 'not having been in jeopardy' in this rule seems to be that, by reason of some defect in the record, either in the indictment, place of trial, process, or the like, the prisoners were not liable to suffer judgment for the offense charged in that proceeding, and so understood, it is true in the present case."

the defendant's consent." *United States* v. *Jorn*, 400 U. S. at 480 (1971).

* * * *

"In the *Ball* case, for example, the Court expressly rejected the view that the double jeopardy provision prevented a second trial when a conviction had been set aside. In so doing, it effectively formulated a concept of continuing jeopardy that has application where criminal proceedings against an accused have not run their full course." *Price* v. *Georgia*, 398 U. S. 323, 326 (1970).

It is just as wrong to resort dogmatically to the test of "attachment" to resolve a given case as it is to declare that because of a jurisdictional defect a defendant was not in "jeopardy." "Those who think more of symmetry and logic in the development of legal rules than of practical adaptation to the attainment of a just result remain troubled by a classification where the lines of diversion are . . . wavering and blurred."[42]

The Court in *Ball*, rather than rejecting the traditional rule, voiced support for it when it said: "An acquittal before a court having no jurisdiction is, of course, like all the proceedings in the case, absolutely void, and therefore no bar to subsequent indictment and trial in a court which has jurisdiction of the offense." 163 U. S. at 669. It also said: "But although the indictment was fatally defective, yet, if the court had jurisdiction of the cause and of the party, its judgment is not void but only voidable by writ of error, and until so avoided cannot be collaterally impeached." *Id.* at 669 and 670. The

---

42. Cardozo, *The Nature of the Judicial Process* at 44 (1921).

latter statement has been construed as indicating that all defective indictments are merely voidable and not void.[43] But this conclusion is not supported by *Ball* or any other decision of this Court. Reference to the first *Ball* case, where a murder indictment was held defective, *Ball* v. *United States*, 140 U.S. 118 (1891), discloses that the defect consisted of the omission of the date and place of the victim's death. The Court noted that the failure to allege the date of death was not fatal since the indictment was returned within a year and a day after the date of the assault, which was stated in the indictment. Therefore, the year-and-a-day rule necessary to support a charge of murder was satisfied. However, the Court held that the failure to state the place of death was fatal because a federal court, being one of limited jurisdiction, could not exercise judicial authority unless the offense was both begun and completed within one of the districts subject to the jurisdiction of the United States. *Id.* at 135 and 136; 18 Stat. 731.

What is important in terms of evaluating the subsequent *Ball* opinion, where the double jeopardy rule was expounded, is the statement in the earlier case that even though the failure to allege the place of death was fatal to the court's jurisdiction to try the offense of murder, the "[d]efendants were well charged with assault . . . ." *Id.* at 136. In the later case the Court said:

> "The former indictment set forth a charge of murder, although lacking the requisite fullness and precision. The verdict of the jury, after a trial upon the issue of guilty or not guilty, acquitted Millard F.

---

43. United States *ex rel.* Somerville v. Illinois, 429 F. 2d 1335, (7th Cir. 1970) (Major, J., dissenting), App. at 28; Respondent's Brief In Opposition at 5.

> Ball of the whole charge, of murder, as well as of any less offense included therein. Revised Statutes, § 1035."[44] 163 U.S. at 670.

Since the greater offense necessarily included the lesser, of which Ball was found not guilty, he could not be convicted of murder. When viewed in light of these facts, *Ball* simply follows the traditional rule of *autrefois acquit*.

Benton v. *Maryland* postulates no broader rule on this point than *Ball*. In spit of the state's contention in *Benton* that the indictment was void and that therefore the defendant was not in "jeopardy," this Court noted that the "petitioner could quietly have served out his sentence under this 'void' indictment had he not appealed his burglary conviction." 395 U.S. at 796. Furthermore, Maryland has held that indictments defective for the reason involved in *Benton* are not void and do not deprive a court of jurisdiction. See, for example, *Smith* v. *State*, 240 Md. 464, 468-69, 214 A. 2d 563 (1965) and *Pratt* v. *Warden*, 8 Md. App. 274, 259 A. 2d 580, 583 (1969). Pertinent, perhaps, is the fact that the Maryland Constitution does not require grand jury indictments for criminal prosecutions.

The history of the rule of double jeopardy is an ancient one, but the governing principles have not substantially changed over the course of time. The most renowned jurists and commentators have expressed their views on

---

44. Revised Statutes, Section 1035 provided: "In all criminal causes the defendant may be found guilty of any offense the commission of which is necessarily included in that with which he is charged in the indictment, or may be found guilty of an attempt to commit the offense so charge: *Provided*, that such attempt be itself a separate offense." 18 Stat. 1035.

the subject, and yet the prevailing view has been in accord with the proposition that we have urged in this brief. The opinion below represents a departure from that tradition, but does not support that anomaly with any explicable reasoning. Inasmuch as neither *Downum* nor *Jorn*, which were relied on by the court below, justify the conclusion reached in the opinion, the judgment should be reversed.

CONCLUSION

For the foregoing reasons, we respectfully request that the opinion of the Court of Appeals for the Seventh Circuit be reversed and that the order of the District Court for the Northern District of Illinois, Eastern Division, dismissing the petition for a writ of habeas corpus as being insufficient upon which to grant relief be affirmed.

Respectfully submitted,

WILLIAM J. SCOTT,
Attorney General,
State of Illinois,

JAMES B. ZAGEL,

E. JAMES GILDEA,
Assistant Attorneys General,
188 West Randolph Street, Suite 2300,
Chicago, Illinois 60601,

Attorneys for Petitioner.